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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

CHRISTOPHER CIVITELLO,

Plaintiff,

No. C 05-04944 WHA

v.

FIRST CREDIT OF AMERICA, INC.,

Defendant.

**COURT'S PROPOSED CHARGE TO THE JURY
AND SPECIAL VERDICT FORM**

Appended hereto are copies of the draft charge to the jury and special verdict form given to both sides on **FEBRUARY 12, 2007**, for discussion with the Court at the charging conference on **FEBRUARY 13, 2007**, at **7:30 A.M.** Counsel are reminded that all objections, additions, or modifications must be made at the charging conference or else they shall be deemed waived.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CHRISTOPHER CIVITELLO,

Plaintiff,

No. C 05-04944 WHA

v.

FIRST CREDIT OF AMERICA, INC.,

Defendant.

[DRAFT]
FINAL CHARGE TO THE JURY
AND SPECIAL VERDICT FORM

1. 1

2 Members of the jury, now that you have heard all the evidence and arguments by counsel,
3 it is my duty to instruct you on the law. A copy of these instructions will be available in the jury
4 room.

5 It is your duty to find the facts from all the evidence in the case. To those facts, you must
6 apply the law as I give it to you. You must follow the law as I give it to you whether you agree
7 with it or not. You must not be influenced by any personal likes or dislikes, opinions, prejudices
8 or sympathy. That means that you must decide the case solely on the evidence and law, as you
9 swore to do at the beginning of the case. You must not read into these instructions or into
10 anything the Court may have said or done as suggesting what verdict you should return — that is
11 a matter entirely up to you.

2. 12

13 The evidence from which you are to decide what the facts are consists of:

- 14 1. The sworn testimony of witnesses, on both direct and cross-examination,
15 regardless of who called the witness;
- 16 2. The exhibits which have been received into evidence;
- 17 3. The sworn testimony of witnesses in depositions, read into evidence and
- 18 4. Any facts to which the lawyers have stipulated. You must treat any
19 stipulated facts as having been conclusively proved.

3. 20

21 Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such
22 as testimony by a witness about what that witness personally saw or heard or did. Circumstantial
23 evidence is proof of one or more facts from which you could find another fact. By way of
24 example, if you wake up in the morning and see that the sidewalk is wet, you may find from that
25 fact that it rained during the night. However, other evidence, such as a turned-on garden hose,
26 may explain the presence of water on the sidewalk. You should consider both kinds of evidence.
27 It is for you to decide how much weight to give to any evidence.

1 4.

2 In reaching your verdict, you may consider only the types of evidence I have described.
3 Certain things are not evidence, and you may not consider them in deciding what the facts are. I
4 will list them for you:

5 1. Arguments, statements, and objections by lawyers are not evidence. The
6 lawyers are not witnesses. What they have said in their opening statements,
7 closing arguments and at other times is intended to help you interpret the
8 evidence, but it is not evidence. If the facts as you remember them differ from the
9 way the lawyers have stated them, your memory of them controls.

10 2. A suggestion in a question by counsel or the Court is not evidence unless
11 it is adopted by the answer. A question by itself is not evidence. Consider it only
12 to the extent it is adopted by the answer.

13 3. Testimony or exhibits that have been excluded or stricken, or that you
14 have been instructed to disregard, are not evidence and must not be considered.
15 In addition, some testimony and exhibits have been received only for a limited
16 purpose; where I have given a limiting instruction, you must follow it.

17 4. Anything you may have seen or heard when the Court was not in session
18 is not evidence. You are to decide the case solely on the evidence received at the
19 trial.

20 5.

21 In deciding the facts in this case, you may have to decide which testimony to believe and
22 which testimony not to believe. You may believe everything a witness says, or part of it or
23 none of it. In considering the testimony of any witness, you may take into account:

24 1. The opportunity and ability of the witness to see or hear or know the things
25 testified to;

26 2. The witness' memory;

27 3. The witness' manner while testifying;

28 4. The witness' interest in the outcome of the case and any bias or prejudice;

1 5. Whether other evidence contradicted the witness' testimony;

2 6. The reasonableness of the witness' testimony in light of all the evidence; and

3 7. Any other factors that bear on believability.

4 The weight of the evidence as to a fact does not necessarily depend on the number of
5 witnesses who testify. Nor does it depend on which side called witnesses or produced evidence.

6 6.

7 You are not required to decide any issue according to the testimony of a number of
8 witnesses, which does not convince you, as against the testimony of a smaller number or other
9 evidence, which is more convincing to you. The testimony of one witness worthy of belief is
10 sufficient to prove any fact.

11 7.

12 A witness may be discredited or impeached by contradictory evidence or by evidence
13 that, at some other time, the witness has said or done something or has failed to say or do
14 something that is inconsistent with the witness' present testimony. If you believe any witness
15 has been impeached and thus discredited, you may give the testimony of that witness such
16 credibility, if any, you think it deserves.

17 8.

18 Discrepancies in a witness' testimony or between a witness' testimony and that of other
19 witnesses do not necessarily mean that such witness should be discredited. Inability to recall
20 and innocent misrecollection are common. Two persons witnessing an incident or a transaction
21 sometimes will see or hear it differently. Whether a discrepancy pertains to an important matter
22 or only to something trivial should be considered by you.

23 However, a witness willfully false in one part of his or her testimony is to be distrusted
24 in others. You may reject the entire testimony of a witness who willfully has testified falsely on
25 a material point, unless, from all the evidence, you believe that the probability of truth favors
26 his or her testimony in other particulars.

1 9.

2 All parties are equal before the law and a corporation is entitled to the same fair and
3 conscientious consideration by you as any party.

4 Under the law, a corporation is considered to be a person. It can only act through its
5 employees, agents, directors, or officers. Therefore, a corporation is responsible for the acts of
6 its employees, agents, directors, or officers performed within the scope of authority.

7 10.

8 In these instructions, I will often refer to a party's "burden of proof." Let me explain
9 what that means. When a party has the burden of proof on any claim by a preponderance of the
10 evidence, it means you must be persuaded by the evidence that the claim is more probably true
11 than not true. To put it differently, if you were to put the evidence favoring a plaintiff and the
12 evidence favoring a defendant on opposite sides of a scale, the party with the burden of proof on
13 the issue would have to make the scale tip somewhat toward its side. If the party fails to meet
14 this burden, then the party with the burden of proof loses on that issue. Preponderance of the
15 evidence basically means "more likely than not."

16 11.

17 On any claim, if you find that Mr. Civitello carried his burden of proof as to each element
18 of a particular claim, your verdict should be for him on that claim. If you find that Mr. Civitello
19 did not carry his burden of proof as to each element, you must find against him on that claim.

20 12.

21 I will now turn to the law that applies to this case. *First*, I will give you a brief summary
22 of the claims and defenses at issue in this case. Civitello seeks a declaration that 1st Credit
23 violated the Fair Debt Collection Practices Act and the California Rosenthal Act. Civitello also
24 seeks to recover damages based on five different claims. Civitello's first four claims are for
25 violations of the Fair Debt Collection Practices Act. Civitello's fifth claim is for violation of the
26 California Rosenthal Act.

1 13.

2 In determining whether 1st Credit violated the Fair Debt Collection Practices Act, you
3 are to evaluate the claims under the least-sophisticated-consumer standard. The least-
4 sophisticated-consumer standard reflects the important balance between the need to protect
5 consumers from deceptive and abusive collection practices and the need to protect the debt
6 collectors from liability based upon unreasonable interpretations of collection communications.
7 This is an objective standard. In evaluating the Fair Debt Collection Practices Act claims, you
8 are to view the conduct and communications from the perspective of the least sophisticated
9 consumer. For any claim of harassment, you are to use the perspective of a consumer whose
10 circumstances make him relatively more susceptible to harassment, oppression, or abuse.

11 14.

12 Under the Fair Debt Collection Practices Act, debt collectors must send consumers
13 written notice of the following information within five days of the initial communication with
14 the consumer:

- 15 (1). The amount of the debt;
- 16 (2). The name of the creditor to whom the debt is owed;
- 17 (3). A statement that the debt will be considered valid by the debt collector
18 unless the consumer disputes, orally or in writing, all or any portion of the
19 debt within thirty days of receiving the letter;
- 20 (4). A statement that if the consumer disputes all or any portion of the debt in
21 writing within thirty days of receiving the letter, the debt collector will
22 obtain verification of the debt and mail a copy to the consumer; and
- 23 (5). A statement that the debt collector will provide the consumer with the
24 name and address of the original creditor, if different from the current
25 creditor, if the consumer sends a written request within thirty days of
26 receiving the letter.

27 If the consumer notifies the debt collector within thirty days of receipt of notice that the debt is
28 disputed, or that the consumer requests the address of the original creditor, the debt collector

1 shall cease collection of the debt until the debt collector sends the consumer verification of the
2 debt.

3 Also, if consumer notifies a debt collector in writing that the consumer refuses to pay a
4 debt or that the consumer wished the debt collector to cease further communication with the
5 consumer, the debt collector shall not communicate further with the consumer with respect to the
6 debt.

7 15.

8 In Mr. Civitello's second claim, he seeks to recover damages from 1st Credit for
9 violating Section 1692c(a)(1) of the Fair Debt Collection Practices Act. Mr. Civitello must
10 prove by a preponderance of the evidence that:

- 11 1. 1st Credit communicated with Mr. Civitello in connection with the collection of a
12 debt;
- 13 2. This communication took place at an unusual time or a time that 1st Credit knew
14 or should have known to be inconvenient to Mr. Civitello; and
- 15 3. Mr. Civitello did not give prior consent to the communication.

16 A "communication" means the conveying of information regarding a debt directly or indirectly
17 to any person through any medium. Examples of communication include but are not limited to
18 letters, telephone calls, automated messages, messages left on answering machines, and voice
19 mail messages.

20 16.

21 Mr. Civitello's third claim is that 1st Credit violated Section 1692e(8) of the Fair Debt
22 Collection Practices Act. The elements of this claim, which Mr. Civitello must prove by a
23 preponderance of the evidence, are:

- 24 1. 1st Credit communicated or threatened to communicate to any person credit
25 information; and
- 26 2. 1st Credit knew or should have known that this credit information was false.

27 As to the second element, a failure to communicate that Mr. Civitello disputed the debt satisfies
28 the element.

1 17.

2 Mr. Civitello's fifth claim is that 1st Credit violated Section 1692f(1) of the Fair Debt
3 Collection Practices Act. The elements of such a claim, which Mr. Civitello must prove by a
4 preponderance of the evidence, are:

- 5 1. 1st Credit attempted to collect a debt from Mr. Civitello;
- 6 2. 1st Credit attempted to collect an amount greater than the principal; and
- 7 3. The additional amount was not expressly authorized by the agreement that created
8 the debt or the amount was not permitted by law.

9 As to the first element, the parties have stipulated that 1st Credit attempted to collect a debt from
10 Civitello. "Amount" includes any interest, fee, charge, or expense incidental to the principal
11 obligation. As to the third element, "permitted by law" means that there is a law that
12 affirmatively authorizes the collection of the additional amount.

13 18.

14 Mr. Civitello's sixth claim is that 1st Credit violated Section 1692d of the Fair Debt
15 Collection Practices Act. Mr. Civitello must prove by a preponderance of the evidence that in
16 connection with the collection of a debt, 1st Credit engaged in a course of conduct toward Mr.
17 Civitello, the natural consequence of which was to harass, oppress, or abuse Mr. Civitello.

18 The parties have stipulated that 1st Credit attempted to collect a debt from Mr. Civitello.
19 Examples of such a course of conduct include but are not limited to: (1) the use or threat of use
20 of violence or other criminal means to harm the physical person, reputation, or property of any
21 person; (2) the use of obscene or profane language or language the natural consequence of which
22 is to abuse the hearer or reader; (4) the advertisement for sale of any debt to coerce payment of
23 the debt; or (5) causing a telephone to ring or engaging any person in telephone conversation
24 repeatedly or continuously with intent to annoy, abuse, or harass any person at the called
25 number.

26 19.

1 Mr. Civitello's eighth claim is that 1st Credit violated Section 1788.17 of the California
2 Rosenthal Act. For this claim, which Mr. Civitello must prove by a preponderance of the
3 evidence that 1st Credit violated any section of the Fair Debt Collection Practices Act.

4 20.

5 For any of the above claims, if you find that each element on which Mr. Civitello has the
6 burden of proof has been proved, your verdict should be for Mr. Civitello on that claim, unless
7 you find that 1st Credit has proved an affirmative defense, in which event your verdict should be
8 for 1st Credit.

9 21.

10 1st Credit asserts the defense of bona-fide error. The bona-fide error defense is a
11 statutory defense included in the Fair Debt Collection Practices Act. If you have found that Mr.
12 Civitello has proven all elements of any claim by a preponderance of evidence, you must then
13 decide if 1st Credit has proven the affirmative defense of bona-fide error for each of those
14 claims. 1st Credit must prove by a preponderance of the evidence all of the following:

- 15 1. The violation was not intentional;
- 16 2. 1st Credit maintained procedures designed to prevent violations such as the ones
17 that you have found to have occurred; and
- 18 3. The violation occurred despite those procedures.

19 A "bona-fide error" does not include mistakes of law or reliance on advice of counsel. If you
20 find that 1st Credit has proven the elements of the bona-fide error defense by a preponderance of
21 the evidence you must find in favor of 1st Credit and against Mr. Civitello as to the alleged
22 violation.

23 22.

24 That concludes the instruction on the issue of liability. Now I will discuss the issue of
25 damages. It is the duty of the Court to instruct you about the measure of damages. By
26 instructing you on damages, the Court does not mean to suggest for which party your verdict
27 should be rendered. The party seeking damages has the burden of proving damages by a
28 preponderance of the evidence.

23.

You are not permitted to include speculative damages, which means compensation for future loss or harm which, although possible, is conjectural or not reasonably certain. Your award must be based upon evidence and not upon speculation, guesswork, or conjecture. However, if you determine that a party is entitled to recover, you should compensate a party for the loss or harm caused by the injury in question which the evidence shows is reasonably certain to be suffered in the future.

24.

If you find that Mr. Civitello proved that 1st Credit violated the Fair Debt Collection Practices Act, you must determine his damages. The Fair Debt Collection Practices Act specifically permits damages to be awarded against the debt collector who violates the Fair Debt Collection Practices Act.

First, actual damages may be awarded to Mr. Civitello as a result of the failure of 1st Credit to comply with the Fair Debt Collection Practices Act. Actual damages may include damages for adverse health effects, embarrassment, or emotional distress. In order for Mr. Civitello to recover actual damages, Mr. Civitello has the burden of demonstrating by a preponderance of the evidence that he suffered actual damages as a result of 1st Credit's failure to comply with a requirement of the Fair Debt Collection Practices Act. In determining the amount of actual damages, you shall consider among other relevant factors, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which noncompliance was intentional.

To recover damages for emotional distress, Civitello must prove, and you must unanimously find, that the emotional distress suffered by Civitello was more than temporary distress or discomfort of the type that would be expected during the normal attempt to collect a debt. The law recognizes that a certain amount of inconvenience, embarrassment, and annoyance are the natural consequences of debt collection.

The Fair Debt Collection Practices Act is not intended to shield the recipients of debt collection efforts from the inconvenience and embarrassment that are the natural consequences

1 of receiving a call from a debt collector. The Fair Debt Collection Practices Act does not
2 prohibit debt collectors from making non-abusive statements designed to encourage voluntary
3 payment.

4 There is no fixed standard or measure in the case of intangible items such as adverse
5 health effects, stress, or emotional distress. If you determine that Mr. Civitello has suffered such
6 damage, you must determine a fair and adequate award of these items through the exercise of
7 your judgment and experience in the affairs of the world after considering all the facts and
8 circumstances presented during the trial of this case.

9 25.

10 In determining the measure of damages, you should consider:

- 11 1. The loss of enjoyment of life experienced;
- 12 2. The mental, physical, or emotional pain and suffering experienced;
- 13 3. The reasonable value of necessary medical care, treatment, and services received
14 to the present time;
- 15 4. The reasonable value of wages or earnings lost to the present time.

16 26.

17 If you award damages on multiple claims, you must also indicate a total to eliminate any
18 overlapping damages and to prevent double counting, as set forth in the special verdict form.

19 27.

20 In addition to actual damages, and regardless of whether actual damages are awarded,
21 you may award statutory damages for violation of the Fair Debt Collection Practices Act in a
22 total amount not exceeding \$1,000. In determining the amount of statutory damages to be
23 awarded you shall consider, among other relevant factors, the frequency and persistence of
24 noncompliance by the debt collector, the nature of such noncompliance, and the extent to which
25 noncompliance was intentional.

26 28.

27 If you find that 1st Credit willfully and knowingly violated the Fair Debt Collection
28 Practices Act, 1st Credit will also have violated the California Rosenthal Act. The Rosenthal

1 Act specifically permits damages to be awarded against the debt collector who willfully and
2 knowingly violates the Fair Debt Collection Practices Act.

3 In addition to actual damages, and regardless of whether you award actual damages, and
4 regardless of whether you award statutory damages under the Fair Debt Collection Practices Act,
5 you may award statutory damages under the California Rosenthal Act in an amount not to exceed
6 \$1,000. In determining the amount of statutory damages to be awarded, you shall consider,
7 among other relevant factors, the frequency and persistence of noncompliance by the debt
8 collector, the nature of such noncompliance, and the extent to which noncompliance was
9 intentional.

10 29.

11 When you begin your deliberations, you should elect one member of the jury as your
12 foreperson. That person will preside over the deliberations and speak for you here in court.

13 You will then discuss the case with your fellow jurors to reach agreement if you can do
14 so. Your verdict as to each claim and as to damages, if any, must be unanimous. Each of you
15 must decide the case for yourself, but you should do so only after you have considered all of the
16 evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

17 Do not be afraid to change your opinion if the discussion persuades you that you should.
18 Do not come to a decision simply because other jurors think it is right. It is important that you
19 attempt to reach a unanimous verdict but, of course, only if each of you can do so after having
20 made your own conscientious decision. Do not change an honest belief about the weight and
21 effect of the evidence simply to reach a verdict.

22 I will give you a special verdict form to guide your deliberations. However, you do not
23 need to address the questions in the precise order listed.

24 30.

25 Some of you have taken notes during the trial. Whether or not you took notes, you
26 should rely on your own memory of what was said. Notes are only to assist your memory. You
27 should not be overly influenced by the notes. When you go into the jury room, the Clerk will
28 bring in to you the trial exhibits received into evidence to be available for your deliberations.

1 31.

2 As I noted before the trial began, when you retire to the jury room to deliberate, you will
3 have with you the following things:

- 4 1. All of the exhibits received into evidence;
5 2. A work copy of these jury instructions for each of you;
6 3. A work copy of the verdict form for each of you; and
7 4. An official verdict form.

8 When you recess at the end of a day, please place your work materials in the brown
9 envelope provided and cover up any easels with your work notes so that if my staff needs to go
10 into the jury room, they will not even inadvertently see any of your work in progress.

11 32.

12 A United States Marshal will be outside the jury-room door during your deliberations.
13 If it becomes necessary during your deliberations to communicate with me, you may send a note
14 through the marshal, signed by your foreperson or by one or more members of the jury. No
15 member of the jury should ever attempt to communicate with me except by a signed writing, and
16 I will respond to the jury concerning the case only in writing or here in open court. If you send
17 out a question, I will consult with the lawyers before answering it, which may take some time.
18 You may continue your deliberations while waiting for the answer to any question. Remember
19 that you are not to tell anyone — including me — how the jury stands, numerically or otherwise,
20 until after you have reached a unanimous verdict or have been discharged. Do not disclose any
21 vote count in any note to the Court.

22 33.

23 You have been required to be here each day from 7:45 A.M. to 1:00 P.M. Now that you
24 are going to begin your deliberations, however, you are free to modify this schedule within
25 reason. For example, if you wish to continue deliberating in the afternoons after a reasonable
26 lunch break, that is fine. The Court does, however, recommend that you continue to start your
27 deliberations by 8:00 A.M. If you do not reach a verdict by the end of today, then you will
28 resume your deliberations tomorrow and thereafter.

1 It is very important that you let the Clerk know in advance what hours you will be
2 deliberating so that the lawyers may be present in the courthouse at any time the jury is
3 deliberating.

4 34.

5 You may only deliberate when all of you are together. This means, for instance, that in
6 the mornings before everyone has arrived or when someone steps out of the jury room to go to
7 the restroom, you may not discuss the case. As well, the admonition that you are not to speak to
8 anyone outside the jury room about this case still applies during your deliberation.

9 35.

10 After you have reached a unanimous agreement on a verdict, your foreperson will fill in,
11 date and sign the verdict form and advise the Court that you have reached a verdict. The
12 foreperson should hold onto the filled-in verdict form and bring it into the courtroom when the
13 jury returns the verdict. Thank you for your careful attention. The case is now in your hands.
14 You may now retire to the jury room and begin your deliberations.

15
16 Dated: [ONLY SIGN AND DATE AFTER
17 INSTRUCTION READ TO THE JURY]

18 WILLIAM ALSUP
19 UNITED STATES DISTRICT JUDGE
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